In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-231

JACK M. GRAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners challenge (1) the propriety of the procedures used by the government in applying for a wire interception order under Title III of the Omnibus Crime Control Act of 1968 and (2) the district judge's finding of probable cause to issue the order. They also contend that it is improper to charge a conspiracy to violate 18 U.S.C. 1955.

After a jury trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 1955 and 371. Petitioners Gray and Bobo were also convicted of using a facility of interstate commerce in order to promote an unlawful activity (gambling) in violation of 18 U.S.C. 1952; they were sentenced to eighteen months' imprisonment on the conspiracy count and given consecutive

two year sentences on the substantive count, the latter term being suspended and probation imposed upon the payment of a $5,000 fine. Petitioner McEwen was sentenced to eighteen months' imprisonment, which was suspended and two years' probation imposed upon the payment of a $10,000 fine. Petitioner Goldberg was sentenced to eighteen months' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App.).

The evidence is fully detailed in the opinion of the court of appeals. It shows that petitioners, along with various other individuals,[1] were involved in a book-making business in South Carolina which received and made bets on various athletic contests. This enterprise involved telephone calls to various New York book-makers. Much of the evidence used by the government in its prosecution was obtained through wire interceptions of petitioners' telephones.

1. Petitioners contend that the procedures utilized by the government in applying for court authorization of the interceptions violated 18 U.S.C. 2515. The application for the intercept order was personally approved by then Attorney General John N. Mitchell, although the application filed with the court indicated that Assistant Attorney General Will Wilson had approved it. Mr. Wilson had not reviewed the matter; rather, his signature was placed upon the letter directing the filing of the application by Deputy Assistant Attorney General Henry Petersen, who had been authorized by Mr. Wilson to sign his name to such applications. The issue of the

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[1] One co-defendant was found guilty of a substantive violation of 18 U.S.C. 1955. Other co-defendants pleaded guilty to violation of 18 U.S.C. 1084 (interstate transmission of wagering information) in connection with the same activities.

validity of the internal Justice Department procedures formerly used in authorizing applications for interception orders is presently before the Court in *United States* v. *Giordano*, No. 72-1057, certiorari granted, 411 U.S. 905, and *United States* v. *Chavez*, No. 72-1319, certiorari granted, May 21, 1973. Accordingly, the Court may wish to defer disposition of the present petition until *Giordano* and *Chavez* are decided.[2]

2. Petitioners urge that the affidavit attached to the government's application for an interception order did not contain sufficient information to warrant a finding of probable cause for the order. Petitioners argue specifically that there was no showing on the part of the affiant (an F.B.I. agent) that the nine informants from whom information on petitioners' gambling activities had been obtained were reliable, or that their information was based on first-hand knowledge; that the information constituted hearsay; and that the information was not current.

In fact, however, the information was described by the affiant as having been obtained by the informants in personal conversation with, or observation of, one or more of the petitioners.[3] The affidavit specifically related that each informant had in the past provided information which had resulted in convictions or arrests or which had been corroborated by further investigation. An affidavit is not, of course, infirm merely because based on hearsay information (see *Jones* v. *United States*, 362 U.S. 257, 269; *Aguilar* v. *Texas*, 378 U.S. 108,

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[2] We are providing petitioners' counsel with a copy of our briefs in *Giordano* and *Chavez*.

[3] We are lodging a copy of the affidavit with the Clerk of this Court.

114). In any event, much of what petitioners characterize as hearsay actually constituted personal observations by the informants. And although some of the information related to events occurring a few months prior to the application, the district court, before approving the application for a wire interception, held an *ex parte* hearing in which the affiant stated that subsequent contacts with several of the informants had indicated that the illegal activities of petitioners were continuing at that time. Finally, the affiant related that independent investigation of telephone company records revealed an inordinate number of phone calls from petitioners' phones. In short, the judge was fully justified, under the standards of *Aguilar* v. *Texas, supra,* and *Spinelli* v. *United States,* 393 U.S. 410, in determining that there was probable cause to issue the wire interception order.[4]

3. Finally, citing the "Wharton rule",[5] petitioners contend that it was improper to charge a conspiracy to violate 18 U.S.C. 1955, because the substantive offense

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[4] Petitioners' argument that more should be required to establish probable cause for an intercept authorization than for a conventional search warrant is answered by the provision of 18 U.S.C. 2518(1)(c) that, in addition to establishing probable cause for a warrant, the investigating authorities must show that normal investigative procedures would not be likely to succeed. The government met this requirement by showing that none of its informants would have been willing to testify and that the experience of government agents indicated that a search and seizure of petitioners' gambling records was not likely to produce evidence sufficient to support a prosecution.

[5] "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 Wharton's *Criminal Law and Procedure,* §89 (Anderson ed., 1957).

(conducting an illegal gambling business involving at least five persons) necessarily includes an agreement[6] This same contention is raised in *Iannelli* v. *United States,* petition for certiorari pending, No. 73-64. In our memorandum in *Iannelli* we have challenged the validity of this contention, but, because of the practical importance of the issue and a division in the circuits as to the matter, we have not opposed the petition for a writ of certiorari. In petitioners' case and in two other cases recently filed with this Court (*Benjamin Fein, et al.* v. *United States,* No. 73-175, and *Larry Kessler* and *Melvin Hoffman* v. *United States,* No. 73-5115), however, the respective parties were not ultimately charged with both substantive and conspiracy violations of Section 1955.[7] They were not, thus, exposed to any risk of the double punishment which the Wharton rule seeks to prevent. See *Pinkerton* v. *United States,* 328 U.S. 640, 643-644. As we stated in our memorandum in *Fein* and *Kessler,* the Court may nevertheless wish to resolve the conspiracy issue with respect to Section 1955 in all its various aspects, *i.e.,* where there is an accompanying substantive conviction (*Iannelli*) and where there is not (*Fein* and *Kessler*).[8]

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[6] Petitioners also contend that the evidence was insufficient to establish a conspiracy. This contention is fully answered by the opinion of the court of appeals, upon which we rely (Pet. App. A28-A29).

[7] In the instant case, the government chose during trial to drop the substantive count in order to simplify the case for the jury. Fein, Kessler and Hoffman were tried together, and the count of their indictment charging substantive violations of Section 1955 was severed prior to trial and subsequently dismissed.

[8] A copy of our memoranda in *Iannelli* and in *Fein* and *Kessler* will be forwarded to petitioners' counsel.

This Court may therefore wish to defer disposition of this petition until determination of the petitions in *Iannelli, Fein* and *Kessler,* as well as the decisions in *Giordano* and *Chavez.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.